LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
MAY 29 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962

No. [redacted] 137

GENERAL MOTORS CORPORATION,
Petitioner,
vs.
UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION
and
THE ALABAMA GREAT SOUTHERN RAILROAD
COMPANY, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ALOYSIUS F. POWER,
Attorney for Petitioner
General Motors Corporation,
3044 West Grand Boulevard,
Detroit 2, Michigan.

Of Counsel:
WALTER R. FRIZZELL and
R. J. McGRATTY, JR.,
3044 West Grand Boulevard,
Detroit 2, Michigan.

American Legal & Record Co., 231 Congress St., E., Detroit 26, Michigan

TABLE OF CONTENTS

	Page
I. Summary Statement of the Matter Involved	2
II. Jurisdictional Statement	3
III. Question Presented	3
IV. Statutory Requirements	3
V. Statement of the Case	4
VI. Jurisdiction of the District Court	8
VII. Argument for Allowance of Writ	8
(a) The Erroneous Interpretation	8
(b) The Importance of the Matter	13

CASES CITED

	Page
A. E. West Petroleum Co. v. Atchison, T. & S. F. Ry. Co. (Mo.), 108 F. Supp. 644, 648	11
Armour & Co. v. Chicago, M. St. P. & Pac. R. Co. (7th Cir.), 188 F. 2d 603, 610, cert. denied 342 U. S. 86	10, 11, 14
Bull S. S. Lines v. Thompson, 123 F. 2d 943, cert. denied 315 U. S. 816	13, 14
East Texas Lines v. Frozen Food Exp., 351 U. S. 49, 54	12
Fine Products Corp. v. Gulf M. & O. R. Co., 299 I.C.C. 758, 760	12
Int. Com. Comm. v. Louis. & Nash. R.R., 227 U. S. 88	10
I.C.C. v. Railway Labor Assn., 315 U. S. 373, 380	11
Metropolitan Metals, Inc., v. Pennsylvaia R. Co., 314 I.C.C. 737, 738	11

CASES CITED (continued)

	Page
Miss. Valley Barge Co. v. U. S., 292 U. S. 282	12
S. H. Kress & Co. v. Agwilines, Inc., 246 I.C.C. 655	11
Schenley Industries, Inc., v. Central of Georgia Ry. Co., 287 I.C.C. 784, 786	11
United States v. Interstate Commerce Commission, 198 F. 2d 958, cert. denied 344 U. S. 893	14
United States v. Menasche, 348 U. S. 528	11

STATUTES CITED

Title 1, U. S. Code §1 (Rules of Construction)	10
Title 5, U. S. Code §1009(e) (Sec. 10(e) of the Administrative Procedure Act)	13
Title 28, U. S. Code §1254 (Judiciary and Judicial Procedure)	3
Title 28, U. S. Code §§1336 and 1398 (Judiciary and Judicial Procedure)	8
Title 49, U. S. Code §1, et seq. (Interstate Commerce Commission)	3
Title 49, U. S. Code §1(6) (Interstate Commerce Commission)	4
Title 49, U. S. Code, §6(7) (Interstate Commerce Commission)	8
Title 49, U. S. Code §§11 and 12 (Interstate Commerce Commission)	3
Title 49, U. S. Code §17(9) (Interstate Commerce Commission)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1961

No.....

GENERAL MOTORS CORPORATION,
Petitioner,
vs.
UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION
and
THE ALABAMA GREAT SOUTHERN RAILROAD
COMPANY, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Earl C. Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully petitions this Honorable Court for a Writ of Certiorari to review a judgment and opinion of the Court of Appeals for the Sixth Circuit

rendered in this cause on February 17, 1962, and in support of this petition respectfully shows:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED

The said judgment of the Court of Appeals for the Sixth Circuit affirmed an order of the District Court of the United States for the Eastern District of Michigan, Southern Division, upholding certain orders of the Interstate Commerce Commission, relating to transportation rates, which orders are adverse to petitioner. The opinion of the Court of Appeals which supports its judgment is included in the certified record[1] along with the opinion of the District Court and the opinions of the Interstate Commerce Commission.[2]

The effect of the judgment of the Court of Appeals is to require the payment by petitioner of railroad transportation rates and charges other than those specified in the lawfully published tariffs of the rail carriers contrary to the requirements of Part I of the Interstate Commerce Act (Title 49 U.S. Code).

---

[1] The certified record (referred to herein as Rec.) consists of all relevant evidence before the Commission as stated in the appendix to appellant's brief, the proceedings before the Court of Appeals, the petition for rehearing, the order denying said petition, and the certification of Carl W. Reuss, Clerk, Sixth Circuit Court of Appeals.

[2] There are two decisions by the Commission. The first by a three member division was favorable to petitioner. The second, on petition of the defending rail carriers, was adverse to petitioner by a vote of 6 to 4, one Commissioner not participating; a petition for reconsideration was denied by a similar vote. (Rec. pp. 6a, 14a and 28a.)

II. JURISDICTIONAL STATEMENT

The Court of Appeals, Sixth Circuit, entered its judgment in this matter on February 17, 1962 (299 F. 2d 233). A timely filed petition for rehearing was denied by said court March 31, 1962. It is believed that the jurisdiction of this court in the instant matter is found in section 1254 of Title 28 of the United States Code.

III. QUESTION PRESENTED

The question presented is whether or not there is a rational basis for the orders of the Interstate Commerce Commission challenged by petitioner. The determination of this question depends upon the application of established rules in railroad freight tariffs.

IV. STATUTORY REQUIREMENTS

Carriers by railroad must comply with the requirements of Part I of the Interstate Commerce Act (Title 49, U. S. Code, §1, *et seq.*) and the Interstate Commerce Commission is empowered to administer the provisions of the act (Title 49, U. S. Code, §§11 and 12). Section 6 of the act requires rail carriers to file with the Commission and to keep open for public inspection schedules of rates and charges for transportation services rendered. Paragraph 7 of section 6 requires that such carriers strictly conform to the provisions of said schedules; said paragraph reads in its essential part as follows:

> "No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this

part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; * * *."

Unreasonable practices affecting the application of freight tariffs are declared by the statute to be unlawful (Title 49, U. S. Code, §1(6)).

V. STATEMENT OF THE CASE

The judgment of the Court of Appeals affirms the decision of the District Court upholding certain orders of the Interstate Commerce Commission under which petitioner was required to pay freight charges in excess of those claimed to be applicable under the provisions of the rail carrier's published tariffs. The rail carriers were defendants in the proceeding before the Commission and intervening defendants in the matter before the courts below.[3]

Petitioner through its Frigidaire Division manufactures and ships household appliances from Moraine, Ohio to points throughout the United States. The shipments involve various types of household appliances and fall generally into two categories. In one category each household appliance is separately rated in the rail carrier's

[3] One Hundred Forty-seven rail carriers were named as defendants before the Commission.

tariffs, under what is known as an "exceptions rating". The second category involves appliances rated under the "exceptions" tariff and those rated under the so-called new classification tariff.[4] The shipment here involved is in the first category.

The pertinent facts are as follows:

A. *The Shipment*—

From Moraine, Ohio to Miami, Florida, November 10, 1953

Articles: Cooling Boxes or Refrigerators, Drying Machines, and Electric Stoves

Total weight 23,625 pounds (Rec. p. 17a);

B. *The Effective Rate Tariffs*—

1) Old class rates applicable only to shipments rated by exceptions ratings (that is, exceptions to the basic classification ratings). (Rec. pp. 40a, 42a.)

2) New class rates applicable only to all-rail domestic shipments subject to the basic classification ratings on and after May 30, 1952. (Rec. pp. 37a, 38a and 42a);

C. *Mixed Carload Rating*—Item 13980-A (Uniform Freight Classification)

Articles included in the item: Cooling boxes * * * refrigerators * * * electric cooking stoves * * * drying machines * * *

[4] On May 30, 1952, under orders of the Commission in dockets 28300 and 28310, rail carriers established a new uniform classification of property and new class rates to apply to shipments subject to the descriptions in the new classification.

Minimum weight requirement 18,000 pounds; Carload rating—Class 55 (Rec. p. 37a);

D. *The Application of Rates to the Shipment*—

	Uniform Classification Rating	Exceptions Rating	Rate ¢ CWT	Charge
Cooling Boxes	(55)	45	234	$468.84
Drying Machines	(60)	47½	248	17.48
Electric Stoves	(45-60)	40	209	60.28
Charge based on Exceptions Ratings				$546.60
Above Articles in One Car, Item 13980-A Mixed Carload (Rec. p. 42a and Opinion below p. 3);	55	None	215	$507.94

E. *Mixed Carload Rule*—Item 5

(Exception to the mixed carload rule 10 in the Uniform Freight Classification)

"Section 1.—Except as otherwise provided, when a number of articles for which the same or different ratings or rates are provided when in straight carloads are shipped at one time by one consignor to one consignee and destination, in a carload (see Rule 14), they will be charged at the actual or authorized estimated weight and at the straight carload class or commodity rate (not mixed carload rate) applicable to each article, except as provided in Rules 12 and 45. [Rules 12, 14, and 45 are not involved.] (Interpolation added.)

* * * *

"Section 4.—If a lower charge would result under the application of Section 1, * * * of this rule than under the provisions for a specific carload mixture, such lower charge will apply." (Rec. p. 38a);

F. *Non-Application of the New Class Rates*—Item 300-B

"Class rates published in tariff, as amended, will not apply where there is in effect on a given shipment a commodity rate, classification exception or column *rating* between the same points via any route." (Rec. p. 38a.) (Emphasis added.)

From these facts the Court of Appeals concluded: (1) That the Class 55 rating for the mixed carload shipment of household appliances as specified in Item 13980-A of the freight classification could not be applied to the shipment because the rule in Item 300-B does not permit the application of the new class rates where there is in effect an exceptions rating *"or ratings"*[5] on said mixed carload shipments, and (2) that the mixed carload rule in Item 5 has no application to the shipment because the rule in Item 300-B "otherwise provides".

Petitioner contends that such conclusions are erroneous as a matter of law in that they effect an approval of transportation rates contrary to the provisions of the rail carrier's published tariffs.

---

[5] The term "ratings" is supplied by interpretation. (See Opinion below, p. 4.)

VI. JURISDICTION OF THE DISTRICT COURT

Jurisdiction to set aside and annul orders of the Interstate Commerce Commission is vested in the District Courts (Title 28, U. S. Code, §§1336 and 1398, and 49 U. S. Code, §17 (9)).

VII. ARGUMENT FOR ALLOWANCE OF WRIT

By statute, transportation services are made available to shippers only in accordance with the terms of published tariffs, and transportation companies are admonished to strictly conform to the provisions of such tariffs (Title 49, U.S. Code, §6(7)). Thus, a rate applied not in accordance with the provisions of the tariff is an unlawful rate. In this matter the Interstate Commerce Commission approved the application of an unlawful rate by an interpretation not in accord with the plain provisions of the tariff in question. That approval, being in error as a matter of law, should not have been sustained by the courts below.

(a) *The Erroneous Interpretation.* The shipment consists of a number of household appliances specifically provided for in Item 13980-A of the new freight classification. On the basis of that tariff provision the applicable freight charge is determined to be $507.94. However, this being a mixed carload shipment, it was subject to the mixed carload rule (Item 5) which provides that if a lower freight charge is determined by the straight carload class or commodity rate applicable to each article in the shipment then such lower charge will apply. In this instance, the computation on the basis of rates applicable to each article in the shipment produced a higher freight charge of $546.60.

The mixed carload rule (Item 5) operates by its terms in the following fashion: section 1 of the rule requires that freight charges, on a mixed carload shipment, shall be computed by the particular carload rate applicable to each article in the shipment and "except as otherwise provided" in section 4 of the rule the freight charges so determined will apply. Section 4 provides that the charges determined under section 1 will apply *only* if they are lower than charges determined under provisions for a specific carload mixture such as, for example, Item 13980-A.

In this respect, the error of the Court of Appeals is expressed in the following paragraph:

> "It is further claimed that neither the Commission or the District Court gave any consideration to Item 5 (Exception to the mixed-carload rule 10 in the Uniform Freight Classification.) This Item states 'Except as otherwise provided * * *.' It was otherwise provided in Item 300-B and hence Item 5 has no application."

Although the Court of Appeals held that Item 5 has no application to the shipment, it is significant that the freight charges found applicable were computed in accordance with the provisions of section 1 thereof. If, then, section 1 of the rule may be invoked, what of section 4 wherein it is provided that section 1 is applicable only if it produces the lower freight charge?[6]

There is no classification exception *rating* on this particular type of shipment. On the other hand, each article

---

[6] A similar mixed carload rule, Item 110-G, is published as part of the so-called exceptions tariff. That rule also requires the application of the lowest of the alternative charges computed on a mixed carload shipment. However, the Commission states that Item 110-G cannot be used in connection with the Uniform Classification rating in Item 13980 (Rec. p. 20a.)

in the shipment, if shipped separately as a carload, would be subject to a classification exception rating. It was this fact which impelled the Commission to find that the word "rating" appearing in Item 300-B should be interpreted to mean "ratings". The Court of Appeals approves that interpretation on the grounds that the Commission found that the objective of the rail carriers "in publishing item 300 was to remove any possible alternation of the uniform class rates where exceptions ratings were established" (Opinion, p. 4). Yet, when Item 300 became effective, May 30, 1952, Item 5, the mixed carload rule providing for the alternative application of rates, also became effective in the same tariff. The plain design of these tariff rules manifests no intention by the carriers to remove "any possible alternation" of rates as applied to mixed carload shipments. The converse is evident. Tariff restrictions should be clear and not left to inference. *Armour & Co. v. Chicago, M. St. P. & Pac. R. Co.* (7th Cir.), 188 F. 2d 603, 610, cert. denied 342 U. S. 86. Administrative orders are void if the findings upon which they are made are "contrary to the 'indisputable character of the evidence' ". *Int. Com. Comm. v. Louis. & Nash. R.R.*, 227 U.S. 88.

The interpretation of the word "rating" to mean "ratings" was urged by the Commission on the basis of U.S. Code, Title 1, Section 1, "Rules of Construction". That rule as it relates to the contention made by defendants reads as follows:

> "In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> words importing the singular include and apply to several persons, parties, or things; * * *."

Plainly, the rule of construction does not permit an administrative determination which is hostile to the major

objective of the railroad tariffs involved. *I.C.C. v. Railway Labor Assn.*, 315 U.S. 373, 380. The cardinal principle of statutory construction is to save, not destroy. The rule to be followed here was well stated by the Commission itself in *Schenley Industries, Inc., v. Central of Georgia Ry. Co.*, 287 I.C.C. 784, 786:

> "Tariffs must be construed according to the plain terms of the language employed, and where the language is unambiguous there is no need to resort to rules of tariff construction or interpretation. *Russel Motor Car Co. v. United States*, 261 U. S. 514." Cf. *Metropolitan Metals, Inc., v. Pennsylvania R. Co.*, 314 I.C.C. 737, 738.

A freight tariff must be construed in its entirety. *Armour & Co. v. Chicago, M. St. P. & Pac. R. Co., supra*, followed in *A. E. West Petroleum Co. v. Atchison, T. & S. F. Ry. Co. (Mo.)*, 108 F. Supp. 644, 648. In *United States v. Menasche*, 348 U.S. 528, at page 538, the Court said that effect should be given every clause of a statute to avoid an interpretation that would emasculate an entire portion of the statute. Here an interpretation would negate an entire tariff requirement as expressed in Item 13980-A and section 4 of Item 5, a long established requirement relating to a specific mixed carload *rating* applicable to mixed carload shipments of freight. Considering that tariff requirement the term "rating", as it appears in Item 300, cannot be given a plural meaning.[7]

In the past the Commission has struck down interpretations which lead to consequences not in accord with tariff

---

[7] Another type of shipment before the Commission in the same proceeding was found subject to the application of the specific mixed carload rating under Item 13980-A by operation of the mixed carload rule, Item 5. That shipment differed from the shipment here involved in that the consist included some articles not subject to classification exceptions ratings. (Rec. pp. 18a-19a.)

provisions. For example, in *S. H. Kress & Co. v. Agwilines, Inc.*, 246 I.C.C. 655, the Commission said:

> "It is believed that the rule of statutory construction stated in *United States v. Ryan*, 284 U. S. 167, 175, is applicable here. The Court there said:
>
> > 'All laws are to be given a sensible construction. A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose.'."

And in *Fine Products Corp. v. Gulf M. & O. R. Co.*, 299 I.C.C. 758, 760, Division 2 of the Commission, concerned with the meaning of tariff terms, stated:

> "A meaning which is clear from commercial or common usage, or from the context, may not be rendered obscure by resort to technical rules of grammar. *Liquid Carbonic Corp. v. Chicago, B. & Q. R. Co.*, 211 I.C.C. 365. Moreover, the provisions of a tariff must be considered in their entirety, and if those provisions may be said to express the intention of the framers under a fair and reasonable construction, that intention must be given effect."

Cf. *East Texas Lines v. Frozen Food Exp.*, 351 U. S. 49, 54.

Nevertheless, the Court of Appeals concludes that there is a rational basis for the Commission's orders and cites *Miss. Valley Barge Co. v. U. S.*, 292 U. S. 282. That case is no authority here. There the record before the Court consisted of the Interstate Commerce Commission's report and order and certain affidavits. None of the evidence received by the Commission was placed before the Court. The settled rule, said the Court, is that the findings of the Commission may not be assailed in the absence of the evidence upon which they were made, and it held that there

was a rational basis for the Commission's findings. That is not the instant case. Here, the facts upon which the Commission relied were before the Court below to enable it to determine whether the Commission, in the exercise of its adjudicatory powers, properly applied the law to the facts. In this instance the record demonstrates that the action of the Commission was arbitrary, capricious, and an abuse of discretion, and not in accordance with law (U. S. Code, Title 5, §1009(e)). The Court of Appeals should have so held.

(b) *The Importance of the Matter.* The matter is important to petitioner, of course, because of the considerable number of shipments involved in this litigation. But of further significance is the departure in this case from firmly established principles of tariff construction which are of interest to all shippers whose business transactions with carriers fall within the ambit of the Interstate Commerce Act.

Those principles have been enunciated by the Court of Appeals, Fifth Circuit, thusly:

> "Courts may not strike down the plain and unambiguous terms of tariffs set up and approved by the Interstate Commerce Commission. It has long been settled that a published tariff rate is to be treated as though it were a statute binding upon both the carrier and the shipper, and that it must be strictly applied regardless of hardships that may arise from its application in particular cases." *Bull S.S. Lines v. Thompson,* 123 F. 2d 943, cert. denied 315 U. S. 816.

And the Court of Appeals, District of Columbia Circuit, calls attention to these principles in the following quotation from a decision in the Eighth Circuit:

> "'A rate tariff is in essence a statement by the carrier to possible shippers that it will furnish certain services under certain conditions for a certain price. When a tariff has become legally promulgated, it is binding upon both the carrier and any shipper taking advantage of it, and its terms (in essence) become, in such respects, the only contract between the two allowed by law. Since the tariff is written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier. Not only is this simply an application of the general rule as to construction of written contracts and instruments, but, when the place occupied by transportation and the situation of shippers are considered, it is particularly useful in application to tariffs. The construction should be that meaning which the words used might reasonably carry to the shippers to whom they are addressed.' Union Wire Rope Corp. v. Atchison, T. & S. F. Ry. Co., 8 Cir., 66 F. 2d 965, 966-967, certiorari denied 290 U. S. 686, 54 S. Ct. 122, 78 L. Ed. 591." *United States v. Interstate Commerce Commission*, 198 F. 2d 958, cert. denied 344 U. S. 893.

The judgment here challenged runs counter to well understood rules of tariff construction frequently expressed by the Commission and restated by the Fifth Circuit Court of Appeals in *Bull S. S. Lines v. Thompson, supra*, by the Court of Appeals, District of Columbia Circuit, in *United States v. Interstate Commerce Commission, supra*, and by the Seventh Circuit Court of Appeals in *Armour & Co. v. Chicago, M. St. P. & Pac. R. Co., supra.*

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said

Appellate Court had in the case numbered and entitled on its docket, No. 14,594, General Motors Corporation, plaintiff-appellant v. United States of America and Interstate Commerce Commission, defendants-appellees, and The Alabama Great Southern Railroad Company, *et al.*, intervening defendants-appellees, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Appellate Court be reversed by the Court, and for such further relief as to this Court may deem proper.

Respectfully submitted,

ALOYSIUS F. POWER,
Attorney for Petitioner
General Motors Corporation,
3044 West Grand Boulevard,
Detroit 2, Michigan.

Of Counsel:
WALTER R. FRIZZELL and
E. J. McGRATTY, JR.,
3044 West Grand Boulevard,
Detroit 2, Michigan.

Dated: May 21, 1962.